80-928

NO.

Supreme Court, U. S.
FILED
DEC 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FRANK L. PARKS, SR.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

ON APPEAL FROM THE
SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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_____Term, 1980

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Frank L. Parks, Sr., by counsel, repsectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Virginia entered on October 10, 1980.

QUESTIONS PRESENTED

I. Whether Petitioner has standing to challenge the search of the subject premises having had a legitimate expectation of privacy therein?

II. Whether the search constituted a violation of Petitioner's Fourth Amendment rights and whether the fruits thereof and subsequent prosecution thereunder should be suppressed?

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The published Opinion of the Supreme Court of Virginia of October 10, 1980, presently not reported, appears in the Appendix hereto at page A-1.

JURISDICTIONAL GROUNDS

The jurisdiction of this honorable Court is invoked to review the judgment of the Supreme Court of Virginia in the case styled Frank L. Parks, Sr. v. Commonwealth of Virginia, Record No. 791727, entered October 10, 1980, in which there was no Order of Rehearing, and in which by Order dated November 18, 1980, execution of the judgment was stayed pending filing of this Petition for Writ of Certiorari with this honorable Court. A copy of said Order staying execution and judgment of November 18, 1980 appears in Appendix A hereto at

page A-2. Jurisdiction is conferred upon this honorable Court to review the decision below pursuant to Title 28, United States Code, Section 1257(3). See Appendix A at page A-3. The case at bar involves the Fourth Amendment made applicable to the State of Virginia by the Fourteenth Amendment of the United States Constitution, the pertinent texts of which appear in Appendix A hereto at page A-4.

STATEMENT OF THE CASE

At approximately 3:45 a.m. on May 4, 1979, Patrolman Junious Wright of the Richmond Bureau of Police was parked on North Fifth Street in the City of Richmond. The area is a central business district of the City. Officer Wright noted a pick-up truck which appeared to be loaded backing into a building approximately one block away on Fifth Street and he drove his car directly in front of the building blocking the pick-up truck. Transcript of Suppression Hearing of August 8, 1979 (hereinafter "Suppression Hearing"), at page 14; page 16, lines 10 and 11. Officer Wright observed three men in the truck. When the truck attempted to drive out of the building, according to Officer Wright, the side of the pick-up truck struck the doors of the building. Wright's car blocked its further progress.

Wright radioed for a backup unit; prior to leaving his police car said unit arrived. Wright asked for and obtained identification of the driver of the truck and also received an explanation for his being in the building. The driver of the truck also exhibited the key which opened the lock on the door to the building. Wright entered the building and took the license number from the rear of the pick-up truck which was still partially inside the building. The driver of the vehicle when asked by Wright indicated that this was a warehouse and not a place of business, and he objected to Wright's further entering the building without "his boss' permission". (Suppression hearing at pages 17, 18 and 34). Using his flashlight Wright continued into the building and examined two automobiles and took down their

vehicle identification numbers (VINs). Wright then made sure the men locked the building and allowed them to leave.

Upon checking with the Division of Motor Vehicles, Officer Wright discovered that the two vehicles whose VIN numbers he had taken down were listed as stolen vehicles. He contacted Richmond Police Bureau Detective Earl H. Clark, who, based upon the information obtained by Officer Wright, obtained a search warrant for search of the building at 408 North Fifth Street. Detective Clark and other police officers entered the building by means of an upstairs window, as the premises were locked, and found additional stolen vehicles and other incriminating evidence which led to the prosecution and conviction of the Petitioner in the case at bar. (Suppression Hearing at pages 11 and 12). As a direct result of the investigation

by the Richmond Police Bureau, the Petitioner in the instant case was charged with two counts of grand larceny (larceny by trick) and stood trial before a jury in the Circuit Court of Henrico County on August 28-29, 1979. The jury returned a verdict of guilty on both counts, sentencing the Petitioner to twelve months in jail and $1,000 fine on each count, judgment upon which was entered and from which the Petitioner appealed to the Surpreme Court of Virginia which affirmed the jury verdict. This present petition is taken from the decision of the Supreme Court of Virginia.

It was stipulated at the Suppression Hearing that Petitioner was the Lessee of the premises searched. (Suppression Hearing at page 116). Documentary evidence showing rental payments by the Petitioner was also introduced at the trial.

DEFENDANT'S EXHIBIT C, see Appendix at page B-2. Testimony by the prosecution's witness corroborated the existence of a Lease in the Petitioner's name. Transcript of trial of August 28-29, 1979, at page 57-59 (hereinafter "Trial Transcript").

The issue of illegal search and seizure was properly raised in a preliminary Motion filed July 18, 1979, a copy of which appears in Appendix B hereto at page B-1, and was argued at a Suppression Hearing on August 8, 1979. In a ruling from the bench, the court overruled the Motion to Suppress, to which exception was taken. Suppression Hearing at page 50. The search and seizure issue was raised as Assignment Number 1 in the Assignment of Error and Petition for Appeal filed with the Supreme Court of Virginia on November 29, 1979,

a copy of said Assignment of Error appears in Appendix B hereto at page B-3. By Order of the Supreme Court of Virginia of April 10, 1980, an appeal was granted to said Assignment of Error, Number 1, a copy of the pertinent part of said Order appearing in Appendix B hereto at Appendix B-4 , and the issue was briefed by counsel and argued on appeal.

LEGAL ARGUMENT

I. Whether Petitioner has standing to challenge the search of the subject premises having had a legitimate expectation of privacy therein?

The Supreme Court of Virginia has ruled on the Fourth Amendment issue raised below and resolved the federal question which has not been but should be settled by this Court: that is, whether there is an expectation of privacy and, therefore standing to assert Fourth Amendment protections in a privately leased premises under the circumstances of the instant case. While this honorable Court has recently decided cases adverse to litigants' standing in asserting Fourth Amendment protection, those cases are factually distinguishable and do not involve traditionally

constitutionally protected premises and a leasehold or proprietary interest therein. The Virginia Supreme Court in its Opinion of October 10, 1980 cited and relied on the recent cases United States v. Payner, U.S. , 48 U.S.L.W. 4829 (1980), United States v. Salvucci, U.S. 48 U.S.L.W. 4881 (1980), and Rawlings v. Kentucky, U.S. , 48 U.S.L.W. 4885 (1980). Each of those cases is factually distinguishable from the case at bar as is the case of Rakas v. Illinois, 439 U.S. 128 (1978).

The record in the case at bar indicates that Parks rented the searched premises, paid the initial rent and deposit from his own funds (Trial transcript at page 57, 150, and Exhibit C) and engaged in the painting and repair or renovation of the premises (Suppression Hearing at page 48, 114, 115, 116).

In addition, Parks was seen by and conversed with other merchants in the neighborhood of the searched premises from time to time. (Trial Transcript at page 109). In addition, after a subsequent search of the premises by the police, car titles legitimately titled to Parks were found on the searched premises and were subsequently returned to the Defendant by police (Trial Transcript at page 59 - 61). The record also generally discloses that at the time of the search of the premises by the police, Petitioner and his wife were working and living in Frederick, Maryland. (Trial Transcript at page 46, 146). Defendant contends that while standing is a legitimate issue in search and seizure cases, when the record shows an ownership interest in the property through deed or lease, as in the present case and use of the premises for storage

of goods or personal belongings on the premises as in the instant case, that these should suffice to show an expectation of privacy in the premises in question. The Virginia Supreme Court's decision would be better served if there were evidence that the Defendant had abandoned the premises or that the premises were left open to third party intrusions without any efforts taken to maintain the security or privacy of the premises. The record clearly discloses however, that the building was in use and that it was locked and secured. The premises were so secure that the police in making their subsequent search of the premises were required to enter by ladder via a second story window. (Suppression Hearing at page 23). The fact that the Petitioner had leased the premises, had engaged in significant repair or work on the premises, was using

the premises for the storage of furniture and personal belongings, and that the premises were capable of and were, in fact, secured from access by third parties establishes that the Petitioner had an expectation of privacy in the premises. The fact that Parks was not present at the premises at the time of the search is explained by his employment and residence in a different locality. More importantly, Petitioner contends there is no requirement that one be present on the searched premises in order to establish an expectation of privacy or assert Fourth Amendment rights if there is some proprietary interest or legitimate expectation of privacy in the premises searched.

In contrast to the instant case, in Rakas v. Illinois, 439 U.S. 128 (1978) the "premises" searched was an automobile wherein weapons were found of which

the Defendants denied both ownership and knowledge. The Defendants were mere passengers in the car and had no ownership interest. In Rawlings v. Kentucky, U.S. , 48 U.S.L.W. 4885 (1980), the object searched was a lady's purse belonging to a third party in which the Defendant had put drugs just prior to the arrival of the police. In United States v. Payner, U.S. , 48 U.S.L.W. 4829 (1980), the object of the search was a briefcase belonging to a third party containing incriminating evidence leading to tax prosecution. In none of these cases was there a search of any premises or objects in which the claimants had any ownership or proprietary interest. The cases are, therefore, factually distinguishable from the instant case.

As to the issue of asserting vicarious rights, in the instant case, Parks'

constitutional arguments are addressed to the premises searched, and his expectation of privacy in the same. He asserts no rights of third parties nor an expectation of privacy in things belonging to third parties. This is quite different from the Salvucci case, supra, in which the premises searched belonged to the mother of one of the Defendants.

The Virginia Supreme Court has also cited the case of Brown v. United States, 441 U.S. 223 (1973). Parks contends that Brown is distinguishable as the defendants in Brown neither alleged nor proved any proprietary interest in the premises searched or the items seized. It is further interesting to note that the individual who had a possessory interest in the premises searched, one Knuckles, successfully challenged the introduction of the stolen goods seized from his store

under a faulty warrant. 411 U.S. at 224. Petitioner contends that if there is any parallel or analogy between the instant case and Brown, that Parks' position is synonymous with that of Knuckles who appears to have had an expectation of privacy based on his proprietary interest sufficient to invoke the Fourth Amendment protection.

In reaching its conclusion that Parks does not have a sufficient expectation of privacy to assert Fourth Amendment rights, the honorable court below would appear to be taking the untenable position that (1) Fourth Amendment rights are somehow correlative with the duration of time that an individual spends at a certain premises, or (2) that an individual must have constant knowledge of the acts that transpire on a premises in order to have an expectation of privacy therein. This

would add a gloss to Fourth Amendment law which does little to secure the people in "their persons, houses, papers, and effects." United States Constitution, Amendment IV. The instant case is not one of possession, of search of property belonging to a third party, or of the assertion of a third party's rights in seized or searched property. It involves the search of a premises which should be constitutionally protected, despite the changing landscape of the law with reference to the exclusionary rule. The instant case does involve privately leased premises, wherein there is no evidence of a surrender or abandonment of the premises, where the Petitioner had personal goods stored, and where there is not the slightest evidence of a diminished expectation of privacy other than the Petitioner's denial of any connection with or knowledge of any

illegal activities on the premises.

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, Book 2, ch. 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.
> Rakas v. Illinois, 439 U.S. 128, 144 f.n. 12 (1978).

Petitioner submits that he has borne his burden of showing a valid expectation of privacy and that the protection of the Fourth Amendment should be accorded him in the instant case.

II. Whether the search constituted a violation of Petitioner's Fourth Amendment rights and whether the fruits thereof and subsequent prosecution thereunder should be suppressed?

The Supreme Court of Virginia has ruled on the propriety of the search raised below and resolved the federal question regarding Fourth Amendment protections contrary to Fourth Amendment case law. Katz v. United States, 389 U.S. 347 (1967). The actions of Patrolman Junious Wright violated Petitioner's Fourth Amendment rights and the evidence was improperly obtained by the police officer from the premises without a search warrant and without consent of the petitioner or anyone present on the premises. The evidence obtained lead to the prosecution and conviction of the petitioner. (Suppression Hearing at page 11).

By Officer Wright's own testimony, he pulled his police cruiser directly in front of the doors, blocking the pick-up truck driven by Petitioner's son, who was one of the three men present at the warehouse on May 4, 1979. When the side of the truck being driven by the Petitioner's son allegedly struck the doors of the warehouse, Officer Wright radioed for and received a backup unit, got out of his car, and questioned the men. (Suppression Hearing at pages 16 - 26). Petitioner's son gave an explanation for his presence in the building, and showed identification, and his keys which operated the lock on the door to the building. Wright ascertained that nothing was being loaded into the truck but in fact articles had been unloaded. (Suppression Hearing at pages 16 - 19). In having requested and received identification of the driver of the vehicle,

indicia of ownership of the premises, (i.e. keys), and having ascertained that nothing was being removed, the police officer was without probable cause to conduct a search of the premises. Nor was the police officer proceeding in a search incidental to an arrest, no arrest having been made. Wright released the three men after he completed his search of the premises. (Suppression Hearing at page 23). The vehicle identification numbers from which Wright took the information which lead to conviction of Petitioner, were not in plain view, as Wright admitted that the warehouse was dark and that he used a flashlight, and that he had to walk further into the building over the objection of Petitioner's son to examine the cars and the vehicle identification numbers. (Suppression Hearing at pages 17, 18, 22 and 34). While this may appear at first

blush to be "plain view", upon closer examination such reasoning fails. Under the plain view doctrine, there are two requirements which must be met for evidence to be admissible; (1) the police must be lawfully present at the site of the search, and (2) the discovery of the evidence must be inadvertent. In addition, the items seized should be immediately recognizable as evidence. Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971). Petitioner submits that none of these criteria have been satisfied in the instant case.

Firstly, the officer's presence inside the warehouse was not pursuant to probable cause, a lawful arrest or consent of the Petitioner. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Therefore, Wright was not "legally" on the premises.

Secondly, Officer Wright's actions

were anything but inadvertent. The policeman was, to put it simply, "fishing". He entered the warehouse on the double pretext of the truck striking the doors and his continued suspicions of the three men even after questioning and obtaining information. Upon entry he shined his flashlight into the building noting the contents of the warehouse and then proceeded from questioning the men to conduct a search of the remainder of the building over the dissent of the individual present who had control of the premises.

Finally, neither the automobiles nor the VINs examined were recognized by Wright as evidence nor could they have been. These were not items of contraband inadvertently discovered but rather constitute evidence seized or gathered without a warrant.

In addition, this was not a warrantless

search necessitated or justified by exigent circumstances, Officer Wright neither fearing for his safety nor the destruction or removal of evidence. Chimel v. California, 395 U.S. 752 (1969). As to the latter, Wright was satisfied that the premises were secured and additionally had a back-up officer and car present at the scene. (Suppression Hearing at page 17). Petitioner submits that after his questioning of the three men, Wright should have withdrawn after having satisfied himself that the premises were locked, left his back-up patrolman to stand watch, and secured a warrant for the search of the building. That Wright short-circuited this procedure by searching and obtaining incriminating evidence without a warrant cannot be cured by asserting "plain view", nor can the search be validated by what it turns up.

Respondents will doubtlessly rely on

various cases to circumvent the tenet that searches without warrants "are per se unreasonable under the Fourth Amendment..." hoping to qualify the acts in question as one of those "few specifically established and well defined exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). However, there must be "a showing by those who seek the exemption (from the search warrant requirement) that the exigencies of the situation made that course imperative." McDonald v. United States, 335 U.S. 451, 456 (1948). Because the building was locked, nothing was being removed, and there was a continuous back-up police surveillance, no exigency existed excusing the necessity of a warrant. Ibid; cf., Shreeves v. United States, 395 A.2d 774, cert. denied, 441 U.S. 943 (1979) (lack of available police back-up to guard car while warrant sought constituted

exigent circumstances.)

Petitioner emphasizes that he asserts his Fourth Amendment rights in the case at bar with reference to the premises searched by Officer Wright and his actions therein. It is stipulated in the record that the Petitioner had a leasehold interest in the premises thereby entitling him to a reasonable expectation of privacy therein which also extended to the contents of said premises. Assuming arguendo that there is a lesser expectation of privacy in automobile VIN numbers, the instant case is distinguishable from United States v. Powers, 439 F.2d 373 (4th Cir. 1971) and United States v. Polk, 433 F.2d 644 (5th Cir. 1970), and similar cases as the two autos and VINs in question were in a protected zone of privacy and not in plain view. Nor did the police officer in the instant case have probable cause

to investigate beyond the pick-up truck and the identity of the three men, which he did. When Officer Wright proceeded further into the building despite protest, he exceeded the scope of probable cause and ventured into a constitutionally protected area. A "lesser" expectation of privacy in VIN numbers does not preclude Petitioner's Fourth Amendment rights in a privately leased warehouse. As the court said in Powers, "(We) believe that inspection of a car's identification number is a search subject to the proscriptions of the Fourth Amendment." 439 F.2d at 375.

Powers, supra, involved a police stop for speeding wherein the police noted the identification number plate was missing from the car's doorpost. A subsequent search of the car for the identification number leading to its discovery as a

stolen vehicle was upheld as having taken place incidental to a valid arrest and having been in plain view.

Polk, supra, involved an inspection of a VIN in a car door frame by a policeman in a public garage where the car had been towed subsequent to an accident that the policeman was investigating. It is easily distinguishable from the instant case which involves a private warehouse leased by the Petitioner. "There was no infringement of other property rights of the defendant, since the car was located in a repair garage, the owner of which gave the officer permission to check the car." 433 F.2d at 647 (emphasis added). In the case at bar, by the officer's own admission and by witness's testimony, Officer Wright proceeded into the building without consent and in spite of protest. (Suppression Hearing at pages 17, 18 and

34). The burden is upon the prosecution to prove that consent to search was freely and voluntarily given and "cannot be discharged by showing no more than acquiescence to a claim of lawful authority." Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968). That the prosecution did not bear its burden is supported by Officer Wright's admission, "He never told me I could go back in the building, no." (Suppression Hearing at page 18).

> Finding and recording the identification number required an overt, searching act beyond the purpose for which the officers were lawfully present. This is a classic case of extending a justifiable but limited intrusion to "a general exploratory search from one object to another until something incriminating at last emerge(d)." State v. Nichols, 581 P.2d 1371 (Wash. Ct. App. 1978), at 1375, dissenting opinion, citing Coolidge v. New Hampshire, 403 U.S. 443, 446, 91 S. Ct. 2022, 2038, 29 L.Ed.2d 564 (1971).

Petitioner submits that the police officer

in the case at bar similarly exceeded constitutional limits in his actions.

In as much as the information obtained in the initial search by Officer Wright was the basis of the search warrant leading to the further discovery of evidence used in obtaining Petitioner's conviction, Parks submits that all evidence so obtained or related thereto should have been suppressed as "fruit of the poisonous tree". Wong Sun v. United States, 371 U.S. 471 (1963).

CONCLUSION

For the reasons assigned the Petitioner prays that the Petition for Writ of Certiorari should be granted and that the writ issue to review the opinion and judgment of the Virginia Supreme Court entered in Case No. 791727 on October 10, 1980, as aforesaid.

Respectfully submitted,

FRANK L. PARKS, SR.

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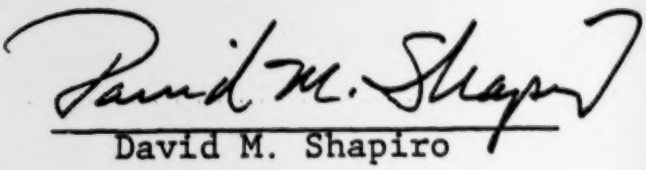
CERTIFICATE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were mailed first class, postage prepaid, to Jerry P. Slonaker, Assistant Attorney General, Counsel for Respondent, at 900 Fidelity Building, 830 East Main Street, Richmond, Virginia, 23219, pursuant to Rule 28 of the Supreme Court of the United States, this 9th day of December, 1980.



David M. Shapiro

APPENDIX A-1

PRESENT: All the Justices

FRANK L. PARKS, SR.

-v- Record No. 791727

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE W. CARRINGTON THOMPSON
October 10, 1980

FROM THE CIRCUIT COURT OF HENRICO COUNTY
E. Ballard Baker, Judge

Frank L. Parks, Sr., was tried before a jury and convicted on two indictments for grand larceny charging obtaining money by false pretenses, Code Section 18.2-178. He was sentenced to serve twelve months in jail and fined $1,000 on each charge. In this appeal Parks challenges the admissibility of certain evidence which he contends should have been suppressed. He also claims the evidence was insufficient to support the verdicts and to prove he participated in the sale of stolen vehicles.

On May 4, 1979, at 3:45 a.m., Police Patrolman Junious W. Wright was parked in his patrol car in the 300 block of North 5th Street in the City of Richmond. He then observed a loaded pickup truck pull into the adjacent block and turn "crossways in the street." Two men got out of the vehicle and opened the double doors of a nearby building. The driver subsequently backed the truck entirely inside the building. Wright testified that at this point his suspicions were aroused, and he proceeded to investigate. Wright circled the block in his patrol car and pulled in front of 408 North 5th Street where the truck had backed in the building. Upon seeing the police car, one of the men "jumped in behind the wheel of the truck" and "proceeded to drive out hurriedly," but, on its way out of the building, the vehicle struck the double doors of the building. Two of the

men pulled the doors farther apart to allow the truck to clear, but, by this time, Wright's patrol car had blocked the entrance-way. Wright radioed for assistance, and after a backup unit arrived, he stepped out of his car to investigate.

The driver of the truck identified himself through use of a driver's license as "Frank Clarke Holmes." The man assured Wright he had every right to be in the building, and as proof he took a key and opened a small door on the building. Still not satisfied that the men were authorized to be on the premises, Wright walked to the rear of the truck, which was still partially inside the building, and copied the license number of the vehicle. While doing so, Wright noticed several automobiles inside the building. Wright asked "Holmes" if a business was being conducted "there," to which "Holmes" responded that the building

served as a warehouse for "their" business in the West End of Richmond. Wright walked farther into the building and wrote down the vehicle identification numbers (VIN)[1] of two of the stored automobiles. Such numbers were visible on each dashboard just inside the windshield. Wright exited the building and allowed the three men to leave. Parks was not present at any time during these events.

Subsequent investigation revealed that the two VIN numbers belonged to automobiles which had been reported stolen. Accordingly, a search warrant was issued and executed. Detective Clarke, who was present during the entire search, testified that once inside the premises he observed "various parts of vehicles setting [sic] around, vehicles that were cut up into sections, engines, doors, tires and wheels." He saw "two rear sections of two different cars, one a '78 Mustang,

two a '78 Olds Cutlass, and . . . a '75 Chevrolet model."

The Chevrolet automobile was a Monza from which the dashboard VIN number had been removed. The car was a "body minus various parts of the front." The confidential VIN number on this sectioned Monza matched the dashboard VIN number on a Monza registered to one Jeffrey Moore. Moore testified at trial that in February, 1979, he became interested in purchasing a 1975 Monza advertised by Parks in "Auto Trader Magazine." Parks and his wife were both present when Moore came to their home to examine the automobile. Moore purchased the car from Parks although he was led to believe that Parks's wife actually owned the vehicle. Moore was informed by either Parks or his wife while both were present that the car was being sold due to their pending marital separation. The Monza sold to Moore was

actually a 1976 model reported stolen in Maryland on December 11, 1978.

Detective Clarke also observed a partially dismantled 1977 Buick Century on the lower level of the North 5th Street premises. The confidential VIN number of this vehicle matched the dashboard VIN on a Buick Regal registered to one Gary Spake. Spake testified that he saw an advertisement in the "Trading Post" on or about December, 1978, offering for sale a 1977 Buick Regal. Spake inquired about the car because its price was $1,000 less than other similar cars on the market. Spake spoke with Parks over the telephone about the car and on two occasions went to view the automobile at the Parks residence. Each time, both Parks and his wife were present. Spake decided to purchase the vehicle, and he tendered a $100 deposit for which Parks issued a receipt as seller. The Buick Regal actually purchased by Spake

was reported stolen in North Carolina on November 21, 1978.

Evidence was introduced by Parks that he "rented" the building at 408 North 5th Street primarily for his son's use. Testimony revealed that "he had no knowledge of anything that went on" in the building. Evidence was also presented to show Parks's son had directed him to stay away from the premises.

The trial court overruled Parks's Motion to Suppress all evidence obtained following Patrolman Wright's detention and alleged warrantless search of May 4, 1979, holding that the officer's actions were within the bounds of lawful investigative procedure. Parks assigns error to this ruling and further complains the evidence was insufficient to support his conviction.

I. INVASION OF DEFENDANT'S PRIVACY.

On Parks's first assignment of error,

the Commonwealth argues that Parks does not have standing to challenge Patrolman Wright's search of the North 5th Street premises because he lacked any legitimate expectation of privacy. Parks contends that the fact that he maintained a leasehold on the property is sufficient to establish his privacy interest against warrantless police intrusion into the building.

In Rakas v. Illinois, 439 U.S. 128 (1978), the Supreme Court abandoned spearate inquiry into a particular defendant's "standing" to contest an allegedly illegal search and seizure in favor of a test for the presence of an expectation of privacy. Now only by examining the "totality of the circumstances" can a decision be rendered as to whether a reasonable or legitimate expectation of freedom from government intrusion exists. See also Rawlings v. Kentucky, ___ U.S.___, 48 U.S.L.W. 4885 (1980). If Parks did not

exhibit such dominion and control over the premises at 408 North 5th Street as would justify the conclusion that he had an expectation of privacy, he cannot assert Fourth Amendment protection.

Not disputed is the fact that Parks was the nominal lessee of the property at 408 North 5th Street. Yet Parks himself stated he had no knowledge of any of the events that went on in the building and that his purpose for renting the building was to "get his son off the street" and set him up in a business. The son directed Parks to stay off the premises; he did not want him "down there."[2] Parks's only apparent use of the building involved his storing of some furniture there. The record is devoid of any evidence that Parks ever attempted to regulate any activity there. Such circumstances are not indicative of a legitimate expectation of privacy.

Further, it is well settled that the Fourth Amendment guarantee cannot be invoked vicariously, that is, one has no standing to challenge an invasion of the privacy of a third party. See Rakas v. Illinois, supra at 133-34. See also Brown v. United States, 411 U.S. 223, 230 (1973); Wong Sun v. United States, 371 U.S. 471 (1963). Similarly, it was held in Alderman v. United States, 394 U. S. 165, 174 (1969), that a defendant who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence seized in a search of a third person's premises has not had his Fourth Amendment rights violated.

These principles were recently reiterated in United States v. Payner, ___ U.S. ___, 48 U.S.L.W. 4829 (1980), and United States v. Salvucci, ___ U.S. ___, 48 U.S.L.W. 4881 (1980). In United States v. Payner, supra, the Court said:

> This Court discussed the doctrine of "standing to invoke the [Fourth Amendment] exclusionary rule" in some detail last Term . . . We reaffirmed the established rule that a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights . . . And the defendant's Fourth Amendment rights are violated only when the challenged conduct invaded his legitimate expectation of privacy rather than that of a third party. (Citations omitted.)

Id. at 4830. In United States v. Salvucci, supra, the Court said:

> While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated. . . property rights are neither the beginning nor the end of this Court's inquiry. In Rakas, this Court held that an illegal search only violates the rights of those who have "a legitimate expectation of privacy in the invaded place." (Citations omitted.

Id. at 4883.

We conclude that Parks did not have any legitimate expectation of privacy in

the premises at 408 North 5th Street and therefore had no standing to assert Fourth Amendment protection.

---

[1]According to the evidence, all American-made automobiles contain numbers unique to each automobile. The most prominent number is displayed on the dashboard or inside the windshield, but "confidential" VIN numbers are placed on various parts of the car not considered in plain view, e.g., transmission casings, etc. These "confidential numbers are so termed because their location is not generally disclosed to the public.

[2]Testimony of Parks's daughter, Stephanie Parks, revealed in pertinent part:

Q. All right. Did Frank, Jr., let you and your father in when you came down there all the time?

A. Well, for a while he did and he'd go down there sometimes, too, and paint and all that, but after a while Frank got where he wouldn't even go down there the weekends he'd go off with his friends, and then after I guess I'd been painting maybe a month and a half and he told me and my dad and Mary Anne just to stay out of there. Just not to come down there, and the [sic] told me he didn't want me to paint and as far as he was concerned, you, know, I was fired off the job. He didn't want me down there.

Q. When was that?

A. I think it was at the end of October. I'm not sure exactly when, it was sometime in October towards the end. Maybe--possibly the beginning of November, but I think it was the end of October. It's been so long.

I know it was either October or November.

Testimony of Detective Clarke revealed in pertinent part:

Q. [W]hat statements did he make to you?

A. He stated that he had to sign the lease on the building at 408 N. Fifth Street for his son, but he had no knowledge of anything that went on.

[Balance of Opinion deleted as not pertinent to questions presented on this Petition for Writ of Certiorari.]

For these reasons the judgement of the lower is affirmed.

AFFIRMED.

APPENDIX A-2

VIRGINIA:
IN THE SUPREME COURT OF VIRGINIA
held at the Supreme Court Building in the City of Richmond on Tuesday, the 18th day of November, 1980.

FRANK L. PARKS, SR.,

Appellant,

against Record No. 791727
Circuit Court Nos. 79F287 and 79F288

COMMONWEALTH OF VIRGINIA,

Appellee.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the appellant, by counsel, praying for a stay of execution of the judgment rendered herein on October 10, 1980, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case rendered on October 10, 1980, be, and the same is hereby,

stayed, to and including the 9th day of December, 1980, on the expiration of which time the same may be enforced, unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

APPENDIX A-3

Title 28, United States Code Annotated, Section 1257.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

APPENDIX A-4

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B-1

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

COMMONWEALTH OF VIRGINIA

V.

FRANK L. PARKS, SR. Case No. 79F287

MOTION

FRANK L. PARKS, SR., hereby moves the court to direct that certain property in which he had either an ownership interest or which were located in premises in which he had a leasehold interest, a schedule of which is annexed hereto, and wich were unlawfully seized by officers of the police department of the City of Richmond, on or about May 21, 1979, from the premises known as 408 North Fifth Street, City of Richmond, Virginia, be returned to him and/or be suppressed as evidence against him in any criminal proceeding.

The movant states that the property was

unlawfully seized because information was obtained by a police officer of the City of Richmond pursuant to an unauthorized police stop and interrogation of the Defendant's son, Frank L. Parks, Jr., said information being illegally obtained, and which furnished the basis of the search warrant pursuant to which the premises were searched.

FRANK L. PARKS, SR.

By /S/
Of Counsel

David M. Shapiro
Caudle and Shapiro
3415 West Cary Street
Richmond, Virginia 23221

CERTIFICATE

I hereby certify that a true copy of the foregoing Motion to Suppress was mailed postage prepaid this 17th day of July, 1979, to J. W. Collier, Jr., Commonwealth's Attorney, County of Henrico, Post Office Box 27032, Richmond, Virginia 23273.

/S/
David M. Shapiro

SCHEDULE

OF EVIDENCE IN QUESTION IN MOTION TO SUPPRESS

IN COMMONWEALTH V. FRANK L. PARKS, SR.

1. 1979 Chevrolet Monaz, serial number

2. 1976 or 1977 Buick Regal, serial number

DEFENDANT'S EXHIBIT C EBB

FRANK LLOYD PARKS
10032 PURCELL ROAD
RICHMOND, VIRGINIA 23228

160-118516 124

July 31 1978 5 68-1/510 21

Morton G. Thalhimer Inc. $ 320 00/100

Three Hundred Twenty and 00/100 DOLLARS

F&M FIRST & MERCHANTS NATIONAL BANK
Richmond, Virginia

MEMO

Frank Lloyd Parks

⑆0510⑈0001⑆ 3007 0181⑈ 0124 ⑈0000032000⑈

APPENDIX B-3

ASSIGNMENT OF ERROR

1. The trial court erred in not suppressing that evidence obtained by the police officer pursuant to an unlawful detention and/or without a search warrant on May 4, 1979 at 408 North Fifth Street in the City of Richmond, and in not suppressing all evidence gained from further search and investigation based on the initial warrantless police intrusion as "fruits of the poisonous tree." . . .

APPENDIX B-4

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA held at the Supreme Court Building in the City of Richmond on Thursday, the 10th day of April, 1980.

FRANK L. PARKS, SR.,

Appellant,

against Record No. 791727
Circuit Court Nos. 79F287 and 79F288

COMMONWEALTH OF VIRGINIA,

Appellee.

From the Circuit Court of Henrico County:

Upon the petition of Frank L. Parks, Sr., an appeal is awarded him from judgments rendered by the Circuit Court of Henrico County on the 29th day of August, 1979, in prosecutions by the Commonwealth against the said petitioner for felonies.

This appeal, however, is limited to the consideration of assignments of error Nos. 1, 3 and 4 which read as follows:

1. The trial court erred in not suppressing that evidence obtained by the police officer pursuant to an unlawful detention

and/or without a search warrant on May 4, 1979, at 408 North Fifth Street in the City of Richmond, and in not suppressing all evidence gained from further search and investigation based on the initial warrantless police intrusion as "fruits of the poisonous tree." . . . .

[Balance of Order deleted as not germane to questions presented on this Petition for Writ of Certiorari.]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-928

FRANK L. PARKS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Upon A Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

MARSHALL COLEMAN
Attorney General of Virginia

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Counsel of Record for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-928

FRANK L. PARKS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Upon a Petition For Writ of Certiorari to the Supreme Court of Virginia

---

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent, Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on October 10, 1980, not be granted.

OPINION BELOW

The judgment of the Supreme Court of Virginia is a published Opinion reported as *Frank L. Parks* v. *Commonwealth of Virginia,* 221 Va. ____, 270 S.E.2d 755 (1980). A copy of the Opinion is contained in the Appendix to the Petition for a Writ of Certiorari at Appendix A-1.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court to issue the writ of certiorari is grounded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Does a nominal leasehold interest in a building itself create a reasonable and legitimate expectation of privacy for the nominal leaseholder in that building such as will invoke for him the strictures of the Fourth Amendment and the Exclusionary Rule, notwithstanding the facts that he rented the premises for his son's business, that he was ordered by that son to stay off the property, and that he has no knowledge of any of the events that go on in the building?

2. Does this case require or justify the exercise of this Court's discretionary jurisdiction?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the Appendix to the Petition for a Writ of Certiorari at A-3 through A-4-(2).

STATEMENT OF THE CASE

The published Opinion of the Virginia Supreme Court, contained in the Appendix to the Petition, sets forth the facts regarding the "search" itself. The following statement relates to the specific issue[1] decided below, i.e., whether petitioner had

[1] Since the Virginia Supreme Court found that petitioner had no reasonable or protected privacy expectation in the building, that Court made no determination of the lawfulness of the patrolman's investigative procedures.

a reasonable and legitimate expectation of privacy in the premises involved to invoke the Fourth Amendment protections.

These premises, located at 408 North 5th Street in the City of Richmond, appeared both "from the outside" and by "looking through the open windows" to be "an abandoned building." (Aug. 28-29 tr. 142). Indeed, "in this particular block [all] the buildings appear from the outside to be abandoned." (Aug. 8 tr. 20). The fact that petitioner was the nominal lessee of the building was not disputed by the Commonwealth. (Aug. 8 tr. 28). The petitioner himself stated, however, that he had "no knowledge of anything that went on" in the building and that his purpose for renting the building was to "get his son off the street" and set him up in a business. (Aug. 28-29 tr. 47, 207). Petitioner's son ordered him to stay off the premises;[2] he did not want him "down there." (Aug. 28-29 tr. 117).

Testimony of petitioner's daughter, Stephanie Parks, revealed in pertinent part:

> Q. All right. Did Frank, Jr., let you and your father [petitioner] in when you came down there all the time?
>
> A. Well, for a while he did and he'd go down there sometimes, too, and paint all that, but after a while Frank got where he wouldn't even go down there the weekends he'd go off with his friends, and then after I guess I'd been painting maybe a month and a half and he told me and my dad and Mary Anne just to stay out of there. Just not to come down there, and the [sic] told me he didn't want me to paint and as far as he was concerned, you know, I was fired off the job. He didn't want me down there.
>
> Q. When was that?
>
> A. I think it was at the end of October. I'm not sure exactly when, it was sometime in October towards the end. Maybe—possibly the beginning of November, but I think

[2] Of course, the petitioner was not at the building when the "search" was conducted. (Aug. 8 tr. 23-24).

it was the end of October. It's been so long. I know it was either October or November [of 1979].[3] (Aug. 28-29 tr. 117).

Testimony of Police Detective Earl Clarke revealed in pertinent part:

Q. [W]hat statements did [petitioner] make to you?

A. He stated that he had to sign the lease on the building at 408 N. Fifth Street for his son, but he had no knowledge of anything that went on. (Aug. 28-29 tr. 47).

ARGUMENT

I.

The Petitioner Had No Reasonable And Legitimate Expectation Of Privacy To Permit Him To Assert That A Search Of The Building Was Illegal.

The bare fact that the lease to the building was in the name of the petitioner was the sole evidence and basis tendered by him at the pretrial suppression hearing[4] to establish his "standing" and expectation of privacy. (Aug. 8 tr. 28-29). Even in his "Reply Brief"[5] filed in the Supreme Court of Virginia, petitioner simply argued that "[t]he Commonwealth's claim that the [petitioner] has not borne his burden[6] in showing standing or an expectation of privacy in the

---

[3] The "search" by Patrolman Wright occurred on May 4, 1979. (Aug. 8 tr. 14-15).

[4] At that suppression hearing the Commonwealth, citing *Rakas* v. *Illinois*, 439 U.S. 128 (1978), asserted *inter alia* that the petitioner lacked "standing." (Aug. 8 tr. 43).

[5] This was petitioner's final brief.

[6] As the petitioner correctly concedes (Petition at 16), the accused has the burden of showing that he had a reasonable and legitimate expectation of privacy in the premises in question. *See Simmons* v. *United States*, 390 U.S. 377, 389-390 (1968); *Rakas* v. *Illinois*, 439 U.S. 128 at 130 n. 1 (1980); *Rawlings* v. *Kentucky*, ____U.S.____, 48 U.S.L.W. 4885, 4887 (1980).

instant case is specious . . . [because] [b]y stipulation at the suppression hearing, by testimony of the Commonwealth's own witness and by documentary evidence, defendant's leasehold interest in the searched premises was established." (Reply Brief at 1). The Virginia Supreme Court in its published Opinion recited petitioner's argument by saying that "Parks contends that the fact that he maintained a leasehold on the property is sufficient to establish his privacy interest against warrantless police intrusion into the building." (App. A-1-(8)).

A property interest alone is not sufficient to invoke the Fourth Amendment. *See Rakas* v. *Illinois,* 439 U.S. 128 at 144 n. 12 (1980); *United States* v. *Salvucci,* ____ U.S. ____, 48 U.S.L.W. 4881 (1980). In *Salvucci,* this Court said:

> While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated . . . property rights are neither the beginning nor the end of this Court's inquiry. In *Rakas,* this Court held that an illegal search only violates the rights of those who have "a legitimate expectation or privacy in the invaded place." (Citations omitted). *Id.* at 4883.

The petitioner now attempts in this Court to modify or at least refine his position.[7] He points not only to the leasehold interest but also to alleged "use of the premises for storage of goods or personal belongings." (Petition at 10). The respondent submits, however, that his position—even if it is considered by this Court—still fails. It is clear that as a practical matter the petitioner had no ability to exclude anyone from the premises, because he had himself been excluded and ordered by his son to stay away. Since by his own admission he was unaware of anything that went on there,[8] he could hardly maintain with validity that he had a legitimate and reasonable expectation of

---

[7] On October 16, 1980 the petitioner filed a notice in the Virginia Supreme Court of an intent to apply for a rehearing, but on November 10, 1980 he filed notice of his abandonment of that intent.

[8] Contrary to the petitioner's suggestion (Petition at 15-16), his denial of knowledge of what "went on" there was not limited to "illegal activity." (Aug. 28-29 tr. 47).

privacy on the ground that he was the owner of some furniture and other property located within the building. There was no evidence that the *petitioner* knew of, had arranged for, or had taken normal precautions—or any precautions at all—to secure his privacy with regard to the furniture or any other items of property located there.[9]

II

This Is Not A Case Which Requires Or Justifies Exercise Of This Court's Discretionary Jurisdiction.

The petitioner recognizes that this Court "has recently decided cases adverse to [his] standing in asserting Fourth Amendment protection," but he argues that those cases did not involve "privately leased premises." (Petition at 7). He cites no material conflict, however, among the federal circuits or among the state courts concerning the application of *Rakas* v. *Illinois, supra, United States* v. *Salvucci, supra, Rawlings* v. *Kentucky, supra,* or *United States* v. *Payner,* ____U.S.____, 48 U.S.L.W. 4829 (1980), the decisions to which he refers.

It does not help the petitioner to observe that the precise Fourth Amendment issue "under the circumstances of the instant case" has not been specifically "settled by this Court." (Petition at 7). There is no reason why it should be. The fact that an issue in a particular context has not been resolved by the Supreme Court has never been a recognized basis for the grant of certiorari. Moreover, it surely would be premature to grant Supreme Court review in a case such as this one on the heels of the several recent decisions of this Court without allowing more time for lower courts to interpret and apply them.

---

[9] The Virginia Supreme Court pointed out that "[t]he record is devoid of any evidence that [petitioner] ever attempted to regulate any activities there." (App. A-1-(9).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jerry P. Slonaker, Assistant Attorney General of Virginia, counsel of record for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 6th day of March, 1981, three copies of the foregoing brief for the respondent in opposition to the granting of a writ of certiorari were mailed first class, postage prepaid, to David M. Shapiro, Esquire, Caudle & Shapiro, 3415 West Cary Street, Richmond, Virginia 23219, counsel of record for petitioner.

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